against him as a confession. In the latter case the court said, "And if, as is certainly the case, parole evidence of such a confession made out of doors, would, in absence of proof tending to show that it had been improperly obtained, be admissible evidence to establish guilt, we think it unquestionable that the record of a confession in court, unimpeached as to the manner of its procurement, should be admitted. But the effect of the confession as proof of guilt, like that of other evidence, is subject to be repelled, and is from the nature of the proceeding, submitted to the judgment of the jury."

In the principal case the trial judge had an opportunity to pass on the facts which led the defendant to enter his plea of guilty both when the plea was entered and when it was later offered as evidence, and under the Connecticut rulings[9] his finding that the confession was not wrongly procured will not be overturned except in a case of clear and manifest error. Applying the orthodox test[10] of admissibility, it does not clearly appear that there was such an inducement in this case as to create a fair risk of a false confession.[11] The withdrawn plea of guilty was therefore rightly admitted as an extrajudicial confession inconsistent with his claim of innocence under the subsequent plea of not guilty.

S. H. S.

INJUNCTION—MANDATORY OR PROHIBITORY?

In a recent California case,[1] a temporary injunction was granted restraining the City and County of San Francisco from running an excess number of cars over terminal loops owned exclusively by the plaintiff street railroad, and over tracks which defendant owned in common with plaintiff. The defendant appealed and continued to run its cars, claiming the injunction to be mandatory in character as it required the defendant to do a positive act by relinquishing an incorporeal hereditament which

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[9] *State v. Cross*, 72 Conn. 722, 727; *State v. Willis*, 71 Conn. 293. See also *State v. Grover*, 96 Me. 363.

[10] I Wigmore on Evidence, §§ 824, 831.

[11] See *R. v. Baldry*, 2 Den. Cr. C. 430, 444; *Beckman v. State*, 100 Ala. 15; *State v. Jones*, 145 N. C. 466, 471. Chamberlayne, The Modern Law of Evidence, § 1485.

[1] *United Railroads of San Francisco v. Superior Court*, 155 P. (Cal.) 463.

it had acquired by the continued use of the cars in the manner objected to. The court held, however, that the injunction was essentially prohibitory in its character, as it merely restrained acts of repeated trespass, and therefore its operation was not stayed by appeal, as would have been the case had the injunction been mandatory. Though the decision of the court is in accordance with the weight of authority, the novelty of the defendant's claim would seem to warrant a brief inquiry as to the principles applicable to the case.

An injunction issues from a court of chancery to compel the specific performance of a duty. This form of remedy may be either preventative and protective, or it may be restorative. If it be the former, it is usually called a prohibitory injunction. If the latter, it is usually called a mandatory injunction, since it compels the defendant to take affirmative action to restore the plaintiff to his original situation.[2]

The wrong complained of in the principal case falls within that class of torts embracing nuisance, repeated trespass, and continuous trespass, which equity will prevent because the legal remedy is inadequate. Since it consists of a series of acts, namely, the unlawful daily running of the defendant's cars over the plaintiff's loops and tracks, it may be defined as a repeated trespass. It differs from a continuous trespass in that the latter, generally consisting of an erection or obstruction placed on the plaintiff's property, is analogous to a nuisance. The inquiry then is: What form of an injunction is necessary in each of the two trespasses to enforce the specific performance of a duty on the defendant's part?

Every case of a continuous trespass necessitates a mandatory injunction for the complete enforcement of the plaintiff's right on the one hand, and the specific performance of the defendant's duty on the other. The court in restraining the defendant from permitting his previous wrong to operate, compels him, in effect, to restore the plaintiff to his former condition by removing the obstruction or erection. It thus compels him to do an affirmative act of destruction. Mandatory injunctions have been issued to compel the removal of dirt,[3] of logs,[4] of a wall,[5] of a sewer,[6]

[2] Pomeroy's Equity, Vol. III, Sec. 1359.
[3] *Eno v. Christ*, 54 N. Y. S. 400.
[4] *White v. Codd*, 39 Wash. 14.
[5] *Haitsch v. Duffy*, 92 Atl. (Del. Ch.) 249.
[6] *Walther v. City of Cape Girardeau*, 166 Mo. App. 467.

of railroad tracks,[7] of a stairway,[8] when these objects were unlawfully placed on plaintiff's property.

What form of an injunction will suffice in the case of a repeated trespass? Since the wrong consists of a series of trespasses, not involving the erection of any obstruction on the plaintiff's land, an order of the court prohibiting the further commission of these acts will be sufficient to enforce the specific performance of the defendant's duty to keep off the plaintiff's land. Prohibitory injunctions have been issued to restrain the soliciting of passengers at a railroad station,[9] the riding of a bicycle on railroad tracks,[10] the cutting of timber on plaintiff's land,[11] the shooting of wild game on plaintiff's hunting ground,[12] and the tearing down of the plaintiff's fences,[13] when these acts were being repeatedly done.

In the principal case it was contended that as the acts complained of were done under a claim of right, and as the running of the excess cars had not been actually prevented by the plaintiff, the city was in possession of the interest claimed, and this injunction while requiring the defendant merely to cease the operation of its cars, really had the effect of compelling the defendant to relinquish that interest, and therefore it was mandatory in its character. The fact that the title or easement is in dispute, and that in the final hearing it may turn out that the defendant did have the title or easement in question and was deprived of its use by the temporary injunction, is not determinative of the question. If there be a dispute as to the title or the extent of the easement, the court will consider the balance of convenience[14] and use its discretion in granting the injunction. But if the court does grant an interlocutory decree, the question whether the injunction is prohibitory or mandatory will depend on whether the defendant, in order to perform specifically what the court says is his temporary duty, will have to do *affirmative acts* either of destruction or construction in order to restore the plaintiff to his original position, or whether he will merely have

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[7] *Northern Cent. Ry. Co. v. Canton Co.*, 65 Atl. (Md.) 337.
[8] *Stallard v. Cushing*, 76 Cal. 472.
[9] *N. Y., N. H. & H. R. R. Co. v. Scovil*, 71 Conn. 136.
[10] *A., T., & Santa Fe. R. Co. v. Spaulding*, 69 Ka. 431.
[11] *Griffith v. Hilliard*, 64 Vt. 643.
[12] *Kellog v. King*, 114 Cal. 378.
[13] *Ladd v. Osborne*, 79 Iowa 93.
[14] *Bacon v. Jones*, 4 Mylne & Craig 433.

to abstain from continuing certain physical acts. Ives v. Edison,[15] where the defendant was compelled to restore a stairway, is on one side of the line as a plain case of a mandatory injunction, while Griffith v. Hilliard,[16] enjoining the defendant from cutting plaintiff's timber, is on the other side as a plain case of a prohibitory injunction. The court, in the principal case, enjoined the defendant from operating an excess number of cars over the plaintiff's loops and tracks. The order, in its character, clearly operated to restrain the commission of a series of acts on the part of the defendant and its agents. Since the defendant was compelled to do no affirmative acts, but was merely restrained from further commission of the acts complained of, the injunction would seem to be clearly preventative in its scope, and therefore prohibitory. On principle, the court's decision seems to be correct.

F. R.

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[15] 124 Mich. 402.
[16] 64 Vt. 643.